SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents.*

REPLY BRIEF FOR PETITIONER

D. M. PATRICK
LESTER COHEN
STANLEY S. HARRIS
E. BALLETT PRETTYMAN, JR.
810 Colorado Building
Washington 5, D. C.

Attorneys for Petitioner

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

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STATUTE:

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REPLY BRIEF FOR PETITIONER

1. Four briefs in opposition to the instant petition for writ of certiorari have been filed by five respondents. In each of those briefs, the respondents acknowledge the superiority of VHF over UHF television channels.[1] The Government incorporates its opposition brief in Case No. 242 into its argument here, and in that brief the Government specifically admits the "inequality between the two types of

[1] Brief for the United States and Federal Communications Commission, p. 4; Brief of Signal Hill Telecasting Corp., p. 7; Brief for Plains Television Corp., p. 4; Brief for American Broadcasting-Paramount Theatres, Inc., pp. 4-5.

channels and the preference of networks, advertisers, and audiences for VHF."[2]

Although respondents thus emphasize rather than contradict petitioner's explanation of the marked disparity between the two types of television services, not one of them offers a theory as to how the "fair and equitable" distribution requirement of section 307(b) could be applied without considering that disparity.

The Government concedes that the purpose of its move of Channel 2 was "improving opportunities for competition" in the cities affected.[3] This is precisely why this case is of such vital significance to the future administration of the Communications Act. The Act contains not one word with respect to any concept of competitive equality in certain cities; it *does* contain the clear statutory mandate that frequencies must be so allocated "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *A fortiori,* superior as well as inferior frequencies must be distributed fairly and equitably. Neither the Government nor any other respondent meets (or attempts to meet) this argument.

Not one opposition brief contends that the Commission gave any consideration to the relative needs of Springfield and St. Louis for the VHF channel which only one could have. No respondent contends

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[2] Brief for the United States and Federal Communications Commission in Opposition in Case No. 242, p. 4, n. 2, WIRL Television Co. v. United States.

[3] Brief for the United States and Federal Communications Commission, p. 3.

that the Commission made any findings with respect to the populations of Illinois and Missouri, or to the number of VHF channels which previously had been allocated to those respective states. Significantly, each respondent glosses over, with barely any reference, this Court's decisions in the *Nelson Brothers*[4] and *Allentown*[5] cases.

2. Respondents' briefs abound in statements to the effect that the Commission's action resulted in more television stations in the cities involved.[6] This simply is not true. The Commission moved channel 2 more than a year and a half ago (February 26, 1957), but neither Springfield nor St. Louis (nor Terre Haute) has even a single new station. Respondent Signal Hill was given channel 2 in St. Louis to become that city's fifth VHF station, but it had been on the air on its UHF channel prior thereto.[7] Respondent Plains remains as Springfield's only television station, and there has been no indication whatsoever that a second UHF station will ever be constructed in the Illinois capital.

Similarly, depriving Springfield of channel 2 has not helped UHF generally, despite respondents'

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[4] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933).

[5] *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

[6] *E.g.*, Brief for the United States and Federal Communications Commission, p. 6; Brief of Signal Hill Telecasting Corp., p. 9; Brief for Plains Television Corp., pp. 4, 5, 7; Brief for American Broadcasting-Paramount Theatres, Inc., pp. 11, 12, 14.

[7] In its Sixth Report and Order—relied upon by respondents—the Commission stated that it was a "basic element" in its allocation plan that large cities should not receive "an undue share of the relatively scarce VHF channels." 1 PIKE & FISCHER RADIO REG. 91:601, 91:621 (1952).

unsupported claims to the contrary. Immediately prior to the Commission's action, there were 401 VHF stations and 95 UHF stations in the United States.[8] Today there are 444 VHF stations and only 86 UHF stations, with a total of 85 UHF stations having gone off the air.[9]

In sum, Springfield has been deprived of its only wide-coverage VHF allocation, and the capital area has been restricted to inferior television service, for no greater reason than to enhance the competitive positions of two existing stations. This, as we submitted in our petition, is violative of this Court's "free competition" holding in the *Sanders Brothers* case.[10] The public of Springfield and Illinois cannot be deprived of their fair and equitable share of superior television service simply to insulate existing stations against competition. As the United States Court of Appeals for the District of Columbia Circuit stated less than two months ago in applying this Court's *Sanders Brothers* doctrine:

> ". . . we think it is not incumbent upon the Commission to evaluate the probable economic results of every license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service."[11]

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[8] *Television Digest*, February 16, 1957, p. 7.

[9] *Television Digest*, August 23, 1958, pp. 1-2.

[10] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[11] *Carroll Broadcasting Co.* v. *FCC*, U. S. Ct. of App. for D.C. Cir., Case No. 14104 (July 10, 1958).

3. In its opposition brief (p. 8), the Government states that respondent Signal Hill—which was given channel 2—made "*ex parte* presentations with respect to the merits of the rule-making proceeding to various members of the Commission." It also claims that petitioner did likewise. The latter statement is not supported by the material cited by the Government. Petitioner did discuss the loss of Springfield's only VHF channel with the mayor of that city, and it is understood that the latter subsequently consulted with members of the Commission.[12] The testimony before the House Subcommittee on Legislative Oversight does not indicate that petitioner or any authorized representative of petitioner ever made any *ex parte* representations whatsoever in this case to any member of the Commission.

In any event the question before this Court is the lawfulness of the Commission's action in ignoring and violating the statutory mandate of section 307(b), and

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[12] *Hearings before Subcommittee on Legislative Oversight of House Committee on Interstate and Foreign Commerce*, pp. 814-815, May 28, 1958 (not yet officially printed). Parenthetically, such representations are not improper in a rule making proceeding. *See Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, 730 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956).

nothing else. The need for review and correction of the action here involved is both urgent and vital.

Respectfully submitted,

D. M. PATRICK
LESTER COHEN
STANLEY S. HARRIS
E. BARRETT PRETTYMAN, JR.
810 Colorado Building
Washington 5, D. C.

Attorneys for Petitioner

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

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